IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 157 OF 2001

The State of Maharashtra & anr. ... Appellants.
Versus.
Santosh Chamanlal Gujrathi. ... Respondent.

Smt.Geeta Mulekar, A.G.P. for the Appellants.

Shri R.M.Hardas for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 3rd February, 2005.

P.C.:

1. Heard learned Counsel appearing for the parties. The following substantial question of law arises in the Second Appeal:

> "Whether the Courts below could have granted a blanket perpetual injunction against the Appellants which has the effect of preventing the Appellants from constructing road through the suit property even after following due process of law?

The Appeal is admitted on the aforesaid substantial question of law. The Respondent waives service. Considering the facts and circumstances of the case, the Appeal is taken up forthwith for final hearing.

2. The Appeal is by the original Defendants i.e. the

State of Maharashtra and the Tahsildar, Yeola, District Nashik. The Respondents filed a suit for perpetual injunction in respect of the land bearing Gut No.78/3/5 of village Chincholi, Taluka Yeola, District Nashik, admeasuring 1 hectare and 23 Ares. The case of the Respondent is that he is the owner of the suit land which is a bagayat land. The suit was filed as the Appellant No.2 started constructing a road through the suit land. After the suit was contested by the Appellants, the learned trial Judge passed the following decree:

> "A) Defendants are perpetually restrained from constructing a road from plaintiff's land bearing Gat No.78/3/5 of Mauji Chinchodi."

3. The learned A.G.P. appearing for the Appellants submitted that the Courts below have committed an error by holding that the existing road is to the south of the suit land and the same does not form part of the suit land. The learned A.G.P. submitted that the Appellants were trying to repair the existing road and there was no question of encroaching upon the property of the Respondents. In the alternative, the learned A.G.P. submitted that the learned trial Judge should have

permitted the Appellants to adopt due process of law and to take possession of the suit land or a portion thereof for the purposes of construction of the road. The learned Counsel for the Respondent has supported the impugned Judgments and decrees by pointing out that the findings recorded by the Courts below are based on evidence on record.

4. I have considered the rival submissions. Both the Courts have recorded concurrent findings of fact that the existing road is to the south of the suit land and it is not part of the suit land. The said finding is based on documentary evidence on record. In the Second Appeal under Section 100 of the Code of Civil Procedure, 1908, the said finding of fact cannot be disturbed. The learned trial Judge has placed reliance on the two maps at Exhs.22 and 26 and has recorded the aforesaid finding which is confirmed by the Appellate Court.

5. However, in my view the operative part of the decree needs modification. The Appellants cannot be prevented from following the due process of law and constructing a road through the suit land. Hence operative part of the decree passed by the trial Court needs modification.

6. Hence the following order:

(i) Clause (A) of the operative part of the

decree of the trial Court is substituted by the following:

"The Defendants are restrained from constructing road from the Plaintiff's land bearing Gat No.78/3/5 of village Mauji Chinchodi, without following due process of law"

The rest of the decree passed by the trial Court stands confirmed.

(ii) The Second Appeal is partly allowed in the above terms with no order as to costs.

(iii) Parties to act on an authenticated copy of this order.

Judge.